

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES; ALEX
M. AZAR, in his official capacity as the
Secretary of the United States Department
of Health and Human Services;

Defendants.

NO. 2:20-cv-01105-JLR

MOTION FOR EXPEDITED LEAVE TO
FILE AMICUS CURIAE BRIEF BY
NORTHWEST HEALTH LAW
ADVOCATES, AND INDIVIDUALS
C.P., AND M.D.

Noted for: August 7, 2020

I. INTRODUCTION

Proposed Amici, Northwest Health Law Advocates and two individuals, C.P., by and through his parents, P.P. and N.P. and M.D., by and through her parents, C.D. and A.D., respectfully request expedited leave to file a brief as amicus curiae in support of Plaintiff State of Washington's position that defendants' proposed Final Rule on Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) ("Final Rule") exceeds HHS's statutory

1 authority, is contrary to law and is arbitrary and capricious. In particular, amici move
2 to file this brief to explain specifically how the Final Rule's narrowing of the definition
3 of "covered entity" will harm Washington residents, including the plaintiffs and
4 proposed class in *Schmitt v. Kaiser Found. Health Plan of Wash.*, C.P. and M.D. Moreover,
5 the proposed Final Rule is beyond the authority of HHS and is arbitrary and capricious.

6 While no rule specifically addresses amicus participation, district courts have
7 broad discretion to grant leave to participate as amicus curiae. *Hoptowit v. Ray*, 682 F.2d
8 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472, 115
9 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Amici may fulfill their role by "assisting in a case of
10 general public interest, supplementing the efforts of counsel, and drawing the court's
11 attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*,
12 694 F.2d 203, 204 (9th Cir. 1982). "[G]enerally, courts have exercised great liberality in
13 permitting amicus briefs." *California v. United States DOI*, 381 F. Supp. 3d 1153, 1164
14 (N.D. Cal. 2019).

15 Here, the proposed amici will provide the Court with: (1) additional information
16 on the non-discrimination rights of enrollees in employer-sponsored health plans and
17 how those rights would be restricted and curtailed, if the Final Rule is allowed to take
18 effect; and (2) explain the specific impact of defendants' Final Rule on C.P., M.D., and
19 other Washington residents.

20 II. ARGUMENT

21 District courts have broad discretion to grant leave to individuals and
22 organizations to participate as amicus curiae. *Hoptowit*, 682 F.2d at 1260. They may
23 consider amicus briefs from non-parties concerning the legal issues that have
24 ramifications beyond the parties directly involved, or if amici have specialized
25 information that can assist the court. *Juarez v. Asher*, 2020 U.S. Dist. LEXIS 102625, at *3-
26

1 4 (W.D. Wash. June 11, 2020); *Skokomish Indian Tribe v. Goldmark*, 2013 U.S. Dist. LEXIS
2 151310, at *5 (W.D. Wash. Oct. 21, 2013) (same).

3 The amicus brief attached in *Appendix A* to this motion demonstrates the impact
4 of the 2020 Final Rule on the rights of disabled and transgender Washington residents.
5 These residents seek non-discriminatory coverage from their health plans. *See App. A*,
6 pp. 3-4, 10-11. Under the new Rule, if implemented, they will lose the ability to enforce
7 that right under the Affordable Care Act’s anti-discrimination law. *Id.* At the same time,
8 many Washington residents will be unable to obtain non-discriminatory coverage under
9 state law, since their plans are only regulated by federal law. *See id.*; *see* SHB 2338
10 (effective June 11, 2020) (amending RCW 48.43.0128 to apply non-discrimination
11 requirements to Washington-regulated health insurance plans).¹ The loss of coverage
12 for disabled and transgender enrollees will be life changing. *See generally*, P.P. Decl.;
13 C.D. Decl.

14 The changes proposed by the Final Rule are without authority and are arbitrary
15 and capricious. As explained in the attached Amicus brief, under the 2016 Final Rule,
16 “covered entities” included all health insurers – even when those that provide employer-
17 sponsored health plans. *App. A*, pp. 4-12. This conclusion is consistent with the specific
18 language in the statute. *Id.* It also makes sense given the policy considerations of the
19 ACA. *Id.*

20 State regulators have issued guidance based upon this long-standing
21 interpretation. *Id.*, pp. 12-14. Indeed, before the 2020 Final Rule was issued, no court or
22 regulator concluded that the term “covered entity” is as narrow as HHS proposes. *See*
23 *id.*, p. 13-14 (*citing cases*).

25 ¹ *See* [http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2338-](http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2338-S.SL.pdf?q=20200721175412)
26 [S.SL.pdf?q=20200721175412](http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2338-S.SL.pdf?q=20200721175412) (last visited 7/24/20).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

III. GOOD CAUSE FOR EXPEDITED HEARING

Proposed Amici respectfully request an expedited determination by the Court on whether to grant leave to Northwest Health Law Advocates, C.P. and M.D. to file an amicus curiae brief by no later than August 7, 2020.

Good cause for an expedited determination exists. This litigation was filed on July 16, 2020, and seeks injunctive relief. As soon as proposed Amici learned of the issues raised by the litigation, they proceeded to file this motion without delay. This motion was filed before defendants submitted a notice of appearance or filed their responsive briefing. Proposed Amici provided all counsel of record with notice of their intent to file this motion.

The issues addressed by proposed amici are limited in scope and will provide the unique perspective of the impact of the 2020 Final Rule on disabled and/or transgender Washington health care consumers who are not otherwise protected by state anti-discrimination law. If Proposed Amici are given leave to file their brief, defendants will have time to respond to the briefing, and for the Court to review it.

IV. CONCLUSION

For the foregoing reasons, proposed Amici respectfully request that the Court grant them leave to file the amicus brief attached as *Appendix A* in support of the Plaintiff, the State of Washington.

DATED: July 29, 2020.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
3101 Western Avenue, Suite 350
Seattle, WA 98121
Tel. (206) 223-0303; Fax (206) 223-0246
Email: ehamburger@sylaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

NORTHWEST HEALTH LAW ADVOCATES

/s/ Janet Varon

Janet Varon (WSBA #14125)
101 Yesler Way, Suite 300
Seattle, WA 98104
Tel. (206) 325-6464
Email: janet@nohla.org

Attorneys for Proposed Amici

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **Marsha J. Chien**
marshac@atg.wa.gov, jennifer.treppa@atg.wa.gov, anna.alfonso@atg.wa.gov, cruecf@atg.wa.gov
- **Neal Harold Luna**
neal.luna@atg.wa.gov, CRUECF@ATG.WA.GOV
- **Brian J Sutherland**
brian.sutherland@atg.wa.gov

DATED: July 29, 2020, at Seattle, Washington.

/s/ Eleanor Hamburger

Eleanor Hamburger (WSBA #26478)

Email: ehamburger@sylaw.com